APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
Plaintiffs

VS.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

This cause comes before the court on the motions of Detrex Corporation for a determination of further proceedings, for a stay of the plaintiffs' pending motion for attorney fees, for reconsideration of Detrex's motion for consolidation, and for oral argument. Also before the court are the motions of Amcast Industrial Corporation and Elkhart Products Corporation (collectively referred to as "Amcast") to technically amend the judgment in accordance with the court of appeals' mandate, and to enforce the supersedeas bond. The court assumes familiarity with this case's facts and procedural history,[1] and finds that it can adequately address the foregoing motions based upon the parties' written submissions. Accordingly, the court denies Detrex's motion for oral argument. For

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[1] *See Amcast Industrial Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1536-39 (N.D. Ind. 1991), *further proceedings*, 822 F. Supp. 545 (N.D. Ind. 1992), *aff'd in part, rev'd in part, remanded*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994).

the reasons that follow, the court finds that Detrex's motions must be denied, and Amcast's motions must be granted.

I.

Amcast contends that the only portion of this court's opinion and judgment which the Seventh Circuit reversed was this court's finding that Detrex was liable as an arranger pursuant to Count II of Amcast's complaint. Thus, Amcast maintains that the court need only make a technical adjustment to the judgment removing Count II as a basis for liability.

Detrex contends that the Seventh Circuit's decision "compels a trial to determine how much trichloroethylene ("TCE") contamination was actually caused by Detrex and Transport Service Company." Detrex bases its argument on the Seventh Circuit's conclusory sentence that Detrex is liable for the TCE spillage from its own truck, but not the spillage from Transport Service's trucks. *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 751. Thus, Detrex maintains that the Seventh Circuit's opinion requires that a trial be held to make a factual determination regarding the total amount of TCE spilled during all deliveries at the site, and the amount of TCE spilled that is attributable to Amcast, Detrex, and Transport. Detrex also claims that because Transport is not a party to this action, the court should reconsider Detrex's motion to consolidate this case with *Detrex Corp. v. Amcast Industrial Corp., et al.*, Cause No. S92-663M (*"Amcast II"*).

Detrex's argument misses the crux of the Seventh Circuit's discussion of apportionment. The appellate court held that because of Detrex's own litigation strategy—failing to file a timely counterclaim or third-party claim for contribution—any apportionment of liability or response costs now must occur in the separate contribution action filed by Detrex, not in this case:

A potentially responsible person who, like Detrex, has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable to the conduct of the plaintiff as distinct from that of the defendant. Rather than file a counterclaim against Elkhart, Detrex argued to the district judge that in the course of adjudicating Elkhart's claim he had to apportion responsibility for the costs between the parties. The judge rejected this argument, together with Detrex's more fundamental argument that it is not a responsible person within the meaning of the statute, and entered judgment in favor of Elkhart for the entire response costs that Elkhart had incurred. Eventually Detrex filed a separate action for contribution from Elkhart; that suit is pending in the district court.

* * *

The argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense, so we dispatch it at the outset. The statute is clear that whoever (like Elkhart) incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person, and if the responsible person believes as Detrex does that his contribution to the mess was trivial and wants the point established promptly he can counterclaim for as large a percentage of the costs as he thinks he can prove was due to the plaintiff's own conduct. The counterclaim if promptly filed will doubtless be tried at the same time as the main claim, so the defendant will at no time be out of pocket by more than the share of the response costs attributable to his own conduct. Obviously Detrex could have counterclaimed without giving up its main argument—that it is not a responsible person and therefore is not liable for any part of the response costs. We do not know why it waited and filed a separate suit.

Amcast Industrial Corp. v. Detrex Corp., 2 F.3d at 748-49. There is no indication that Seventh Circuit remanded the case for a trial to apportion costs between Amcast, Detrex, and Transport.[2]

Accordingly, Detrex's motions for determination of further proceedings ordered by the Seventh Circuit, and for reconsideration of its motion for consolidation, must be denied.

II.

Detrex also claims that because the Seventh Circuit did not address one of its arguments on appeal—that Amcast failed to comply with the National Contingency Plan ("NCP")—this court should certify that issue back to the Seventh Circuit. Detrex cites no authority for the proposition that this court can, in essence, tell the court of appeals how to do its job.[3] Rule 40 of the Federal Rules of Appellate Procedure affords a party fourteen days within which to file a petition for rehearing, and to "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked."

Further, compliance with the NCP is a necessary prerequisite to the imposition of liability; the Seventh Circuit could not have upheld this court's decision that Detrex was liable for response costs connected with the

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[2] Had the Seventh Circuit wanted this court to conduct a trial to apportion response costs between Amcast, Detrex, and Transport, it could have stated so directly, it could have held that this court abused its discretion in not allowing Detrex to file its contribution counterclaim, or it could have indicated (in dicta) that the instant case should be consolidated with Detrex's contribution action which is pending before this court. Instead, the court explained that "[Detrex's] argument that the judge had to apportion liability between Detrex and Elkhart in Elkhart's suit makes no sense." *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 748.

[3] Detrex cites 28 U.S.C. § 1291, which applies to final judgments, and 28 U.S.C. § 1292, which applies to interlocutory appeals. The relief Detrex seeks, however, is not from a final judgment or interlocutory order. Thus, neither statute is controlling.

spillage from its trucks without also determining that Amcast complied with the NCP.

Accordingly, Detrex's request that this court certify the case back to the court of appeals must be denied.

III.

Detrex next contends that Amcast's pending motion for attorney fees should be stayed in light of *Key Tronic Corp. v. United States*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (1993). The issue before the Court in that case is whether attorney fees constitute recoverable response costs in a private cost recovery action under CERCLA. This court already held that such fees are recoverable, and currently faces the task of quantifying the amount of reasonable fees that Amcast should recover. Should the Supreme Court disagree with this court's holding, Detrex can move at that time for the appropriate relief.

Accordingly, the court must deny Detrex's motion to stay Amcast's pending motion for attorney fees.

IV.

Amcast contends that in response to the Seventh Circuit's decision and mandate, this court need only technically amend the judgment and remove Count II as a basis of liability. The court agrees. The Seventh Circuit disagreed with this court's opinion and judgment concerning Detrex's "arranger" liability (Count II), *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d at 751, but held that Detrex remained liable for the spillage of TCE from its own trucks (Count I). *Id.* Accordingly, pursuant to the mandate and decision of the United States Court of Appeals for the Seventh Circuit, the court must grant Amcast's motion to technically amend the judgment.

V.

Pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, Detrex posted a $1.5 million supersedeas bond pending appeal; the court approved the bond. Amcast moves to enforce the supersedeas bond and to have the proceeds distributed in satisfaction of the judgment with post-judgment interest. Detrex does not dispute that the supersedeas bond is enforceable, but contends that the amount of liability is not fixed. Detrex claims that the supersedeas bond cannot be enforced until the court decides Detrex's motion for determination of further proceedings. For the reasons stated previously, Detrex's motion for determination of further proceedings must be denied; thus, the amount of Detrex's liability is fixed. Accordingly, Amcast's motion to enforce the supersedeas bond must be granted.

VI.

In conclusion, the court:

(1) DENIES the defendant's motion for oral argument (filed January 31, 1994 (#396));

(2) DENIES the defendant's motion for determination of further proceedings ordered by the Seventh Circuit (filed January 31, 1994 (#397));

(3) DENIES the defendant's motion for reconsideration of its motion for consolidation (filed January 31, 1994 (#397));

(4) DENIES the defendant's request that this court certify the case back to the court of appeals (filed January 31, 1994 (#397));

(5) DENIES the defendant's motion for a stay of the plaintiffs' motion for attorney fees (filed January 31, 1994 (#397));

(6) GRANTS the plaintiffs' motion to amend the judgment (filed January 24, 1994 (#393)), and in connection therewith, the clerk is ORDERED to enter judgment as follows:

IT IS ORDERED AND ADJUDGED that previously, on November 18, 1991, partial summary judgment was granted to plaintiffs and to defendants. In light of the that decision, as well as the decision reported at 822 F. Supp. 545 (N.D. Ind. 1992), and the decision and mandate of the United States Court of Appeals for the Seventh Circuit, *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), judgment is entered herein accordingly. Judgment is entered for the plaintiff on Count I of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, plus attorney fees, litigation expenses, and prejudgment interest in sums to be determined hereafter; interest shall accrue on the amount of the judgment as allowed by law. Judgment is entered for the defendants on Counts II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint. Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' Plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its successors or assigns are liable include attorney fees, litigation expenses, and prejudgment interest.

and

(7) GRANTS the plaintiffs' motion to enforce the supersedeas bond (filed January 28, 1994 (#394)).

SO ORDERED.

ENTERED: March 28, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. S88-620M

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Defendants

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that previously, on November 18, 1991, partial summary judgment was granted to plaintiffs and to defendants. In light of that decision, as well as the decision reported at 822 F. Supp. 545 (N.D.Ind.1992), and the decision and mandate of the United States Court of Appeals for the Seventh Circuit, *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7TH Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), judgment is entered herein accordingly. Judgment is entered for the plaintiff on Count I of the plaintiffs' complaint in the amount of $1,197,082.42 as response costs incurred as of November 22, 1991, plus attorney fees, litigation expenses, and prejudgment interest in sums to be determined hereafter; interest shall accrue on the amount of the judgment as allowed by law.

Judgment is entered for the defendants on Counts II, IV, V, VII, VIII, IX, and XIII of the plaintiffs' complaint. Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintif [sic] Elkhart Products' Plant in Elkhart, Indiana. The future response costs for which defendant Detrex and its succesors or assigns are liable include attorney fees, litigation expenses, and prejudgment interest.

Current interest rate: 4.51%

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on: April 4, 1994

Geraldine J. Crockett

By /s/ [Illigible]
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S88-620M

AMCAST INDUSTRIAL CORPORATION, *et al.*,
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vs.

DETREX CORPORATION, *et al.*,
Defendants

MEMORANDUM AND ORDER

This cause is before the court on the supplemental motion of plaintiffs Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast") for attorney fees, litigation expenses, additional response costs, and prejudgment interest. For the reasons that follow, the plaintiffs' motion is granted in part and denied in part.

Amcast seeks $57,122.85 in additional response costs incurred between May 1, 1992 and July 31, 1993. Charles Rytlewski, Elkhart Product Corporation's controller, affirms that Amcast expended $12,045.00 on system service charges (sewer and utilities); $5,833.85 on labor expenses; $38,284.00 on consultants (investigation, design, monitoring); and $960.00 on equipment, installation and monitoring costs. Detrex has not objected to these additional response costs, and the court finds these additional response costs reasonable. Accordingly, Amcast is entitled to recover $57,122.85 in additional response costs.

Amcast also seeks $163,345.70 in attorney fees. In light of the United States Supreme Court's recent decision

in *Key Tronic Corp. v. United States*, No. 93-376, 1994 WL 237635 (U.S. June 6, 1994), which held that private litigants' attorney fees associated with bringing a cost recovery action under § 107 of CERCLA are not recoverable, Amcast's motion for attorney fees must be denied.

Accordingly, the plaintiffs' supplemental motion for attorney fees, litigation expenses, additional response costs, and prejudgment interest (filed February 22, 1994 (#403)) is GRANTED IN PART and DENIED IN PART as follows:

(1) the motion is GRANTED with respect to the plaintiffs' request for additional response costs, Detrex Corporation is hereby ORDERED to pay the plaintiffs $57,122.85 in additional response costs, and the plaintiffs are ORDERED to calculate the prejudgment interest on the additional response costs and submit that figure to the court within fifteen (15) days of the date of this order; and

(2) the motion is DENIED with respect to the plaintiffs' supplemental request for attorney fees and litigation expenses.

SO ORDERED.

ENTERED: June 15, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
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ORDER

On April 15, plaintiffs Amcast Industrial Corporation and Elkhart Products Corporation (collectively "Amcast") submitted their recalculation of prejudgment interest based upon the court's March 30 Memorandum and Order. Amcast requests $35,830.37 in prejudgment interest on attorney fees and litigation expenses, and $2,121.85 in prejudgment interest on previously incurred response costs.

Based upon *Key Tronic Corp. v. United States*, No. 93-376, 1994 WL 237635 (U.S. June 6, 1994), Amcast is not entitled to prejudgment interest on the court's previous award of attorney fees. Defendant Detrex Corporation filed no objection to the amount of $2,121.85 in prejudgment interest on the additional response costs, and that amount will be awarded to the plaintiffs.

Accordingly, the court ORDERS defendant Detrex Corporation to pay the plaintiffs $2,121.85 in prejudgment interest.

SO ORDERED.

ENTERED: June 15, 1994.

/s/ Robert L. Miller, Jr.
ROBERT L. MILLER, JR.
Judge
United States District Court